

COMMERCIAL VEHICLE SAFETY ALLIANCE



An Association of State, Provincial and Federal Officials
Responsible for the Administration and Enforcement of Motor
Carrier Safety Laws in the United States, Canada and Mexico.

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September 18, 1998

DOT Docket No. FHWA-98-3414 -19
Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, SW
Washington, DC 20590-0001

DEPT. OF TRANSPORTATION
DOT, ST. SECTION
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Dear Sirs:

This is in response to the Federal Highway Administration's (FHWA) request for comment relating to the North American Uniform Out-of-Service Criteria (OOSC)

The Commercial Vehicle Safety Alliance (CVSA) is an international safety organization representing highway safety enforcement agencies in the United States, Canada and Mexico dedicated to reducing commercial motor vehicle involvement in highway crashes and incidents. The purpose of the CVSA is to promote and encourage the maintenance and operation of commercial vehicles in a manner that safeguards and protects the health and safety of the general public. The CVSA membership believes that this purpose is best served by increased state/provincial presence supported by an aggressive, uniform roadside inspection and enforcement program.

These comments will attempt to answer the following questions, but not necessarily in the order as contained in the docket:

- What are the OOSC?
- Who should be responsible for them?
- How should they be used?
- Are they appropriate for regulatory treatment?
- Should they remain as guides to the enforcement of motor carrier safety by participating jurisdictions?
- If so, in what manner?
- Should they continue to be used in safety fitness determinations?

The current OOSC is developed and is maintained by the CVSA. CVSA was initially organized by a cooperative effort of various western states and Canadian provinces. The initial goals of CVSA were to provide for an agreement on uniform inspection criteria and reciprocity among member jurisdictions to mutually recognize inspections, including out-of-service notices. With the advent of the FHWA's Motor Carrier Safety Assistance Program (MCSAP)(49 U.S.C. Subsection 31102) and with the encouragement and support of FHWA, the CVSA expanded dramatically on the belief that such a collective assembly could best further the goal of establishing uniform inspection procedures and enforcement guidelines.

The OOSC was first developed and used by the U.S. Federal Government (Interstate Commerce Commission) in the early 1950s.

Initially, the criteria was not made available to the public due to concern that motor carriers would inspect/maintain equipment to the criteria, and not to the regulatory requirements.

The criteria was made public in the late 1970s, but still developed by the U.S. Federal Government with little or no industry input.

CVSA began the open process (government/industry) through its committee structure to maintain the criteria in the early 1980s.

The OOSC is intended to provide uniform, international guidelines to roadside inspectors identifying those conditions/violations that are so unsafe as to likely cause an accident or breakdown.

The OOSC distinguishes between those regulatory violations that need immediate corrective action and those that can be corrected at a later time at a more convenient repair location.

The OOSC was never intended to be regulation or an enforcement instrument - only guidelines to identify those regulatory violations that need to be corrected prior to further operation.

The criteria is developed through government/industry consensus utilizing an open forum.

The criteria has provided the foundation for international uniformity - based upon expert judgments. (Government/motor carriers/manufacturers/etc.)

The criteria are not mandatory. Roadside inspectors have the authority to make the final decision on action to be taken.

The criteria allows for flexibility - the option to require violation corrective action at the inspection location or to direct/escort vehicles to a safer location.

The criteria was first used by FHWA in 1993 in their safety fitness rating methodology, thus triggering the criticism we are confronted with today.

The CVSA committees (where the OOSC is developed) are made up of representatives from the enforcement community in the United States, Canada, and Mexico. The committees also consist of members of the transportation industry, manufacturers, manufacturer's organizations, the federal governments of the U.S., Canada, and Mexico, as well as other interested parties who have joined CVSA as Associate Members. Presentations are frequently made before the committees by representatives and distributors, driver associations, and specific cargo/cargo security interests in an effort to assist the committees in their deliberations for determining revisions/additions to the OOSC. These deliberations do not take place in a vacuum or closed forum. All meetings are open to anyone with an interest in the work of the respective committees of the Alliance.

The fact remains that the OOSC was never intended to be an enforcement instrument. While it is true that a reasonable person might form a conclusion that placing a driver and/or vehicle out-of-service is punitive in nature, another reasonable person might assert that the out-of-service action is merely a correction of a serious situation which the motor carrier and/or driver failed to correct for whatever reason. The OOSC was developed and is used as a guideline to aid inspection personnel in making a determination as to when drivers and/or vehicles with serious safety violations/defects would be required to correct said serious violations/defects before being allowed to continue operating on North American highways. The intent of the OOSC is to promote international uniformity of application throughout North America. It is, after all, the roadside inspector who has discretion to make the final decision on the action to be taken in regards to a specific driver/vehicle inspection.

Even the Federal Highway Administration (FHWA) has previously recognized that the OOSC are merely guidelines for the enforcement officers conducting roadside inspections. FHWA's former Assistant Chief Counsel for Motor Carrier Law (now the Director, Office of Motor Carrier Research & Standards) Paul L. Brennan, in his response to an inquiry from K. Michael O'Connell, dated May 1, 1996 on this subject, stated, in part ".....The underlying safety regulations, be they state or federal, are the actual 'out-of-service' because they proscribe conduct that violates them. Virtually all such regulations prohibit operation of a vehicle or by a driver when to do so would be a violation of the regulations. The jurisdiction enforcing these proscriptions, recognizing that prohibiting further movement of such vehicles or by such drivers until the violation is cured would create major traffic and custody problems on the roadside, have agreed to allow some practical tolerance to strict compliance and to apply these tolerances uniformly throughout the country. The OOSC constitute the standards for the expression of those enforcement tolerances. They are developed and maintained through the joint standard-setting deliberations of all participating jurisdictions through a CVSA committee process. The CVSA acts as the custodian of the standards.

There are some violations that are considered too serious to be allowed to continue until corrected. When these violations are discovered during roadside inspections, the enforcement officers use whatever authority they may have been granted by the jurisdiction in which they are empowered to act to prevent the violation from continuing. In such cases, the violations must be corrected before the offending vehicle or driver is allowed to resume. If the violations have not reached that degree of seriousness, a citation or warning will generally be issued and the vehicle or driver will be permitted to resume operation with the understanding that the condition will be corrected at the first opportunity

We strongly agree with FHWA that the regulations are the actual OOSC. Most jurisdictions have "Unsafe Vehicle" laws on their books. Under these laws, a vehicle can be prevented from further operation for any safety violation. The OOSC is simply guidelines developed for the roadside inspector which identifies those regulatory violations, which if not corrected before further operation, would likely cause an accident or breakdown. CVSA members have entered into an agreement under the Memorandum of Understanding (MOU) to uniformly adhere to these international guidelines. To employ the OOSC as an enforcement tool is to move beyond its original intent. The OOSC has very little, if any, statistical or scientific basis. As a tolerance guideline for roadside inspections, we believe none is needed.

The Federal Motor Carrier Safety Regulations (FMCSR) are very specific about the operating condition of commercial drivers and vehicles. Section 391.1 sets the parameters of Part 391; additional qualifications; duties of carrier-drivers by stating the following: "The rules in this part establish minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers. The rules in this part also establish minimum duties of motor carriers with respect to the qualifications of their drivers".

Section 393.1 sets forth the requirements for parts and accessories necessary for safe operation of commercial vehicles. It states, "Every employer and employee shall comply and be conversant with the requirements and specifications in this part. No employer shall operate a commercial motor vehicle, or cause or permit it to be operated, unless it is equipped in accordance with the requirements and specifications of this part." Part 393 goes on to specify the equipment necessary for a commercial motor vehicle and its respective operating condition.

Part 395 covers the requirements for hours of service of drivers. Section 395.1 (a) states, "The rules in this part apply to all motor carriers and drivers, except as provided in paragraphs (b) through (k) of this section." Paragraphs (b) through (k) cover such exceptions as: adverse driving conditions; emergency conditions; driver-salesperson; oil field operations; 100 air-mile radius drivers; retail store deliveries; retention of driver's record of duty status; sleeper berths; State of Alaska; State of Hawaii, and travel time.

Section 395.3 specifies maximum driving time as follows:

- "(a) Except as provided in Section 395.1(b)(1) and 395.1(i), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:
 - (1) More than 10 hours following 8 consecutive hours off duty; or
 - (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.
- (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after:
 - (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
 - (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week."

Section 395.8 sets out the requirements for the driver's record of duty status. Paragraph (a) of that section states, "Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section."

Section 395.8(e) states, "Failure to complete the record of duty activities of this section or Section 395.15, failure to preserve a record of such duty activities, or making false reports in conjunction with such duty activities shall make the driver and/or the carrier liable to prosecution."

Part 396 deals specifically with inspection, repair, and maintenance of motor vehicles. Section 396.1 states, "Every motor carrier, its officers, drivers, agents, representatives, and employees, directly concerned with the inspection or maintenance of motor vehicles shall comply and be conversant with the rules in this part." Section 396.3 requires that, "Every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control." Section 396.3(a)(1) requires that, "Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in Part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems." Section 396.3(a)(2) specifies that, "Push out windows, emergency doors, and emergency door marking lights in buses shall be inspected at least every 90 days."

Section 396.7 forbids unsafe operation. Section 396.7(a) states, "A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle." There is no other explanation of what those circumstances might be. We assume that one should employ the "reasonable person" approach to addressing these possible conditions. The "reasonable person" approach could be defined as that conclusion which a reasonable person would be expected to reach. However, one can conclude that these conditions detailed in the OOSC meet the intent of Section 396.7.

Specific requirements for equipping a motor vehicle and the operation of said equipment are contained throughout the FMCSRs.

The federal government, over the years, has, itself, recognized the need for preventing unsafe commercial drivers and/or motor vehicles from continuing in operation over this nation's highways. The FMCSRs currently contain language which provides for placing drivers out-of-service for excess hours and vehicles out-of-service for violations which have deteriorated to such a degree that they would likely cause an accident or result in a vehicle breakdown.

The goals of CVSA since its inception in the early 80s have been uniformity, reciprocity and compatibility of driver/vehicle inspections. The OOSC and its constant revision/update has been just one effort put forth by the organization to attain those goals.

The OOSC is a dynamic, living document in that it needs to be changed and revised as new technologies emerge and as new information becomes available from both industry and enforcement sources. Inclusion of the OOSC into the U.S. Federal Regulations subjects them to the formal federal rulemaking process which disallows any speedy remedy should errors need to be corrected or new issues and/or equipment technologies need to be addressed. It also moves the process into the requirements of the Administrative Procedures Act and Ex Parte Communication. U.S. Federal adoption of the OOSC would have little or no positive impact on our Canadian/Mexican members, thereby creating great potential for lack of uniformity in implementing the guidelines.

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Mr. Craig Morris, then President of the Canadian Council of Motor Transport Administrators, wrote the following letter to Associate Administrator George Reagle on October 1, 1997 concerning this subject:

“The Board of Directors of the Canadian Council of Motor Transport Administrators has given careful consideration to the possibility of the Commercial Vehicle Safety Alliance (CVSA) Out of Service Criteria (OOSC) being placed into the Federal Register.

While we certainly understand the reasons for considering such an action, Canadian jurisdictions have expressed concern because to do so would have the effect of fundamentally altering the until-now “North America” collaborative nature of the criteria. To incorporate the OOSC into the Federal Register would mean that Canada (and Mexico, but we do not presume to comment on their behalf) would, by default, be tied to United States’ law and its resulting processes.

CVSA is a major contributing factor to uniformity of commercial vehicle safety enforcement in Canada, the United States and Mexico. The OOSC is used as a basis to enforce commercial vehicle standards by every jurisdiction in Canada. This is due, in part, to the formal process under the current CVSA bylaws that enable jurisdictions and industry in Canada the same opportunity as U.S. jurisdictions and industry to provide input into the OOSC, and subsequently, jurisdictions have an equal vote on any proposed changes.

The existing rule making process in the U.S. would not afford the same opportunity to Canadian jurisdictions and industry for input and voting as previously mentioned. The legislative process is generally slow and cumbersome, and it could conceivably take years to adopt the numerous amendments that are required to ensure continuous improvement of a living document such as the OOSC. These sorts of delays could have significant detrimental consequences for industry in areas such as technology, where the opportunities to enhance safety and efficiencies at the same time are arising constantly.

If there is a way that the OOSC could be linked to the Federal Register only by way of reference, where CVSA would still be free to update the criteria in its present way without being caught in administrative tangles and delays, we would be pleased to look favorably at such an alternative.

I trust that this will be of value to you and welcome further contact if we can be of any further assistance.”

CVSA Headquarters sent a memorandum to all member agencies under date of June 16, 1997, the subject of which was the Petition for Rulemaking No. 96-08. A copy of the Acting Federal Highway Administrator’s Decision regarding the rulemaking was attached. The purpose of the memorandum was to solicit recommendations from our members regarding the inclusion of the OOSC as a regulation or incorporating it by reference in the FMCSRs.

There were a total of forty-five (45) responses to our inquiry. One response, from the Michigan State Police, echoes the consensus of the CVSA membership and follows in its entirety:

"I am writing in response to your inquiry regarding the proposed Out-of-Service Criteria (OOSC) rulemaking.

Michigan opposes the concept of incorporating the OOSC as a rule (or by reference) in the Federal Motor Carrier Safety Regulations (FMCSR). Michigan strongly believes the OOSC to be strictly a guideline document for roadside and scale inspection personnel, and should not be used as the basis for any type of enforcement.

Michigan opposes the development of a Uniform Fine Schedule based on the OOSC, and opposes the use of the OOSC in any federal safety rating process or enforcement document.

Michigan asserts that under the law a vehicle can be prevented from further operation for any violation. The OOSC is simply an agreement that all member jurisdictions have agreed to abide by under the Memorandum of Understanding (MOU). To employ the OOSC as an enforcement tool is to move beyond its original intent.

The OOSC has no statistical or scientific basis. As a guideline for roadside inspections, none is needed. To move the OOSC into the enforcement arena demands a statistical foundation that no one in government or industry can provide.

Some states have actually gone to the point of making the OOSC their standard policy for issuing citations. There are numerous examples of safety violations that should be cited which do not appear in the OOSC. Enforcement personnel take the OOSC to court with them to show it as the basis of their enforcement actions. CVSA never envisioned, or intended, the use of the OOSC as an enforcement tool when the document was first created.

The U.S. Department of Transportation should be made aware, in no uncertain terms, that CVSA opposes the use of the OOSC as the basis for any type of enforcement action or penalty guideline. This entire issue would not be playing out before us now if this fact had been made clear earlier.

Michigan has not adopted the OOSC into state law, and has no intention to do so. The authority needed to prevent a vehicle from further operation is adequately provided for in the regulations, themselves. Michigan adopted both the Federal Motor Carrier Safety Regulations (FMCSR) and the Federal Hazardous Materials Regulations (FHMR) into state law by reference, and believes that these documents together with the officer's authority, are sufficient to prevent the continued operation of an unsafe vehicle.

Michigan does make reference to the use of the OOSC in the initial adoption of the FMCSR and FHMR, by stating:

‘ . . . with the intent of following the policies and procedures of the United States Department of Transportation’s Federal Highway Administration as they relate to Title 49 of the Code of Federal Regulations and the North American Standard Uniform Out of Service Criteria and inspection procedures.’

This shows the State intends to follow the national scene in regards to inspection of vehicles, but it is not a wholesale adoption of the OOSC into law.

We believe the same as the National Tank Truck Carriers that CVSA has no more right to ‘make law’ than any other trade association. The fact that its members are mostly government employees makes no difference. The only way CVSA can maintain the OOSC as its own document is to state that the OOSC is not an enforcement document and should not be used as such. If the FHWA wants to use the OOSC as a basis for their safety rating process, they should take the information from the OOSC and remove all references to CVSA and OOSC.

Adoption of the OOSC into the Federal Regulations will sever all ‘ownership’ of the document from CVSA. The OOSC and inspection procedures are the basis of everything that is accomplished at CVSA. If the OOSC can be adopted, so can the inspection procedures be internalized by FHWA. Without CVSA, the states have no unified voice with FHWA, and without street level input, we all lose.”

In the ANPRM under the heading of “What is the FHWA’s Role in the Development of the OOS Criteria?” it states, “The FHWA is a non-voting member of the CVSA, as are representatives of numerous trade organizations, such as the American Trucking Associations (ATA), the National Private Truck Council (NPTC), the Owner-Operator Independent Drivers Association, Inc. (OOIDA), and the National Tank Truck Carriers, Inc. (NTTC). Committees of the CVSA consider and recommend modifications to the OOS Criteria, which are then accepted or rejected by a vote of CVSA member jurisdictions.”

What is not said in the above paragraph, is the make-up of the CVSA Special Committees. FHWA and industry have available to them no few than three (3) each *voting* member seats on every one of the ten (10) CVSA Special Committees. It is in these committees that any additions, deletions or changes to the OOSC are openly discussed and initial decisions are made. Additionally, CVSA believes that enabling the states to play a greater role in the practical applications of enforcement policies is entirely consistent with the agency’s objective of promoting effective partnerships in the regulation of commercial motor vehicle safety. We see no useful purpose to be gained by FHWA’s control over the OOSC or bogging it down in the highly time consuming notice and comment rulemaking.

CVSA is opposed to the adoption of the OOSC into the FMCSRs. We believe that undertaking a process that would require, for each out-of-service criterion, justification for determining the point at which the particular condition is severe enough to warrant terminating the particular activity, to be an unnecessary action. The rulemaking would presumably make each out-of-service criterion a rule in and of itself, which would undermine the prohibitory nature of the current rules.

It must also be remembered that the membership of CVSA is international in scope. Canada and Mexico are active participants in CVSA activities, including the formulation and approval of the OOSC. Incorporating the OOSC into U.S. Federal Regulations as rules would do little to foster the international uniformity of the enforcement community.

Adoption by the FHWA, as so noted in the ANPRM, would also remove from the states and provinces this means to develop consensus standards for the exercise of enforcement discretion. Although elevating the criteria to the level of rules would assure public participation in the development and maintenance of the OOSC, it does not necessarily follow that any value would be added in the process. We agree with the premise that a certain amount of discretion must be retained at the inspector's level to deal expeditiously with the practical issues that arise at the roadside. Guidelines reflecting the collective contributions of the enforcement community and industry would be difficult to produce and maintain under a federal rulemaking system.

CVSA could support the FHWA seeking approval from the Director of the Office of Federal Register to incorporate by reference the CVSA criteria into the FMCSRs, provided the process did not delay the implementation of additions or changes to the OOSC beyond the established implementation date. CVSA should remain the custodian and publisher of the OOSC under this scenario. FHWA's control over a product being utilized for the sole purpose of a tolerance guideline offers no substantial improvement to the procedure.

The alternative to incorporation of the OOSC into the FMCSRs by reference, as we see it, is to maintain the current policy of treating the OOSC as discretionary enforcement tolerances and leaving their development and implementation up to the states and provinces.

To incorporate the OOSC into federal regulations would require that each proposed revision go through another rulemaking proceeding. In addition, the utilization prohibitions in the Federal Advisory Committee Act (FACA) and the contact prohibitions implicit in the Administrative Procedures Act (APA) would mean that useful input from collective state and provincial deliberations would be jeopardized.

CVSA does not believe that the OOSC should continue to be used in any form in safety fitness determinations. It is that use by FHWA that has brought us to the instant rulemaking proposal. FHWA should be treating roadside violations/defects the same way they treat the violations found during a Compliance Review conducted at a carrier's facility. In fact, the roadside violations should be divided into categories according to severity levels (such as critical and acute) just as other violations are handled. FHWA has been in the process for sometime now of assessing roadside violations in accordance with certain risk factors. The results of that work could be a starting point for assessing severity levels to violations of the various regulations generally found during roadside inspections. Additionally, FHWA has in its possession adequate data on roadside violations to allow them to assess criticality rankings to those violations for the purposes of safety fitness determinations. The term "Out-of-Service Violations" should not be referred to in those determinations. We will address this issue further in our official comments to Docket No. FHWA-98-3639.

In summary, CVSA, as an international commercial vehicle safety organization, could not support the incorporation of the OOSC into the U.S. federal regulations for all the reasons previously discussed in this document.

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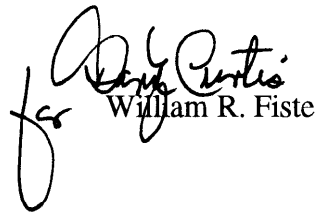
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We could support the incorporation of the OOSC into the U.S. federal regulations by reference, provided there are some assurances that the OOSC would not get bogged down in the regulatory process which, in the best of times, is a slow and cumbersome process.

We hope that these comments will be beneficial to you in your deliberations. We appreciate the opportunity to participate in this process in the name of international harmonization and international uniformity of commercial vehicle safety enforcement procedures.

Should you have any questions, please do not hesitate to call me.

Sincerely,

for
William R. Fiste